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Transaction ID 13657714

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

COUNTRY LIFE HOMES, INC.,	:	
	:	
Petitioner and	:	
Counter-Respondent,	:	
	:	
v.	:	**C.A. No. 2288-S**
	:	
CHARLES SHAFFER and	:	
DONNA SHAFFER,	:	
	:	
Respondents and	:	
Counter-Petitioners.	:	

MEMORANDUM OPINION

Date Submitted: September 22, 2006
Date Decided: January 31, 2007

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NOBLE, Vice Chancellor

Petitioner and Counter-Respondent Country Life Homes, Inc. ("CLH") built a home for Respondents and Counter-Petitioners Charles Shaffer and Donna Shaffer (the "Shaffers") in Lewes, Delaware. A dispute arose over various alleged construction defects encountered by the Shaffers after closing on the purchase of the home. The Construction Contract between CLH and the Shaffers required submission of disputes arising under that agreement to arbitration before the American Arbitration Association ("AAA"). At the closing, however, the Shaffers enrolled in the Home Buyer 2-10 Warranty Program (the "Warranty Program") which provided for arbitration of disputes over construction defects before Construction Arbitration Services, Inc. ("CAS").[1] Broad warranties to protect the Shaffers would be implied under the terms of the Construction Contract; the Warranty Program, however, only provided the Shaffers with limited warranty protection and established short time periods within which most claims had to be raised. The Shaffers submitted their claim to the American Arbitration Association and received an award of $18,046.51, plus interest. CLH submitted the same claim to the CAS; the arbitrator there, acting sooner than the AAA arbitrator, came to a different conclusion: no liability was imposed upon CLH. Thus, there are conflicting arbitration awards, both of which may be read to resolve the same

[1] The documents provided at closing anticipated that any arbitration would be before the National Academy of Conciliators. For reasons not entirely clear in the record, arbitration under the Warranty Program was conducted by CAS. The parties do not quarrel about the substitution.

controversy. The Court, by virtue of the parties' cross-motions for summary judgment, is called upon to resolve the conflict.

The contract between the Shaffers and CLH, dated May 24, 1996, for construction of the dwelling calls for arbitration of disputes:

> DEFAULT AND ARBITRATION. Any controversy or claim arising out of or relating to this Agreement (contract) or its breech (sic), or a default of same, shall be settled by The American Arbitration Association. The judgment on the award rendered by the association shall be final.[2]

The Construction Contract also provided that "[the Shaffers] shall receive at settlement a 10-year Home Buyers Warranty covering the various aspects of the home herein described."[3]

On February 8, 1997, at their closing with CLH, the Shaffers enrolled in the Warranty Program.[4] They executed the "Application for Home Enrollment" (the "Application")[5] and received the Home Buyers Warranty Booklet (the "Booklet").[6] The Application signed by both the Shaffers and CLH, recited the following:

- This is your application for enrollment. It, and your copy of the HBW limited warranty booklet make up your warranty contract. . . .

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[2] Resp'ts' Mot. for Summ. J. to Confirm AAA Arbitration Award Ex. A (the "Construction Contract") ¶ 36.
[3] *Id.* ¶ 32.
[4] The Warranty Program is administered by Home Buyers Warranty Corporation ("HBW"); the warranty coverages are insured by National Home Insurance Company ("NHIC").
[5] Pet'r's Application to Vacate Arbitration Award Ex. B.
[6] Resp'ts' Mot. for Summ. J. to Confirm AAA Arbitration Award Ex. B. For convenience, the Application and the Booklet, which together define the rights and duties of the parties, under the Warranty Program, are sometimes collectively referred to as the Warranty Agreement.

- This is the complete agreement among us. There are no oral or other written agreements or representations directly or indirectly connected with this agreement. No party will be bound by any other representations or agreements made by any person.

- The Homebuyer(s) and Builder understand, and by signing this form do hereby acknowledge, that the warranty is an Express Limited Warranty and that no person or entity shall have any liability whatsoever, by implication or otherwise, for coverage which is not Expressly stated in the warranty booklet.

The Application also informed the Shaffers that the "warranty obligations of the Builder are insured by [NHIC]. The insurance policy, of which you are not the insured, is on file . . ."

The Booklet, which is also captioned "Workmanship/Systems and Structural Limited Warranty Coverage," contains the following provisions of note:

> This booklet, together with the [Application] which you signed, is your builder's limited warranty to you. Your builder warrants that, within the limitations described in these two documents, your Home will be free from major structural defects, and if so indicated on the Application, will also be free from defects in workmanship and systems.[7]
>
> * * *
>
> This Warranty is a contract between you and your Builder. HBW is the warranty administrator, but NOT a warrantor under the contract. NHIC is your Builder's Warranty Insurer, and . . . is not a party to this Warranty Contract, but as your Builder's Insurer has agreed to perform certain tasks and undertake certain obligations which are described in this booklet.

[7] The Warranty Program provided one year workmanship/two-year systems/ten-year structural coverage.

* * *

> This is an Express Limited Warranty offered by your builder. **No other warranties are insured by NHIC.** To the extent possible under the law of your State, all other warranties, express or implied, including but not limited to any implied warranty of habitability, are hereby disclaimed.
>
> * * *
>
> ARBITRATION. In order to be able to arbitrate <u>any</u> dispute, you <u>must</u> have followed the complaint/claim procedures set forth [above] within the time limit set forth there. Any controversy or claim or complaint arising out of or relating to the workmanship/systems limited warranty coverages provided under the terms of this agreement which you and your Builder do not resolve by mutual agreement will be resolved by final and binding arbitration in accordance with the National Academy of Conciliators (NAC) rules applicable to the Home Warranty Industry in effect at the time of the arbitration, or other NHIC or HBW approved rules.
>
> Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof upon the application of Builder, you, NHIC, or HBW. The contract between you and your Builder, and this warranty agreement among you, your Builder and HBW and NHIC—who administer and insure warranties in many states—are transactions involving interstate commerce.
>
> * * *
>
> Questions of whether issues are arbitrable shall be determined by the arbitrators.

The Shaffers encountered several problems with their home, including a failed septic system, a leaking chimney, and an improperly installed water diverter. The repairs also necessitated a re-landscaping of their yard. The Shaffers initially

sought relief in the Court of Common Pleas, but CLH deflected that effort by asserting that the dispute was subject to arbitration.

The Shaffers then pursued arbitration under the Construction Contract through the AAA. On September 3, 2002, they filed their arbitration claim with AAA and gave notice of their intent to arbitrate to CLH. The sought an award of $20,992.45, based on a five-item list. In short, they alleged damages of $13,165.94 for matters relating to the defective septic system; $500 for additional work required for their chimney; and $6,700 for lawn-related (sod, irrigation system, final grading) issues.[8]

On October 18, 2002, CLH filed for arbitration before the CAS under the Warranty Agreement. To specify the "construction defect(s) to be arbitrated," CLH attached that portion of the Shaffers' demand for arbitration filed with the AAA that contained the list of five items.[9]

The CAS arbitration was the first to hearing. The Shaffers moved to dismiss that proceeding.[10] They argued, *inter alia*, that their dispute with CLH was properly before the AAA; that it would be improper to conclude that the Warranty Agreement provided the exclusive remedy for the defects they were experiencing; that the CAS arbitrator lacked jurisdiction beyond the specific warranty provided

[8] Pet'r's Reply Br. in Supp. of its Mot. for Summ. J. to Confirm CAS Arbitration Award, Aff. of Michael M. Fannin Ex. A.
[9] *Id.* Ex. B.
[10] Letter of John A. Sergovic, Jr., Esq. (June 30, 2006) ("Sergovic Letter") Ex. A-6.

by the Warranty Agreement; that CLH, as the builder with no affirmative claim, could not initiate proceedings before the CAS arbitrator; and that the prior-filed AAA arbitration proceeding had precedence over the CAS sponsored proceeding. The CAS arbitrator, nevertheless, on April 21, 2003, proceeded with the arbitration hearing despite the Shaffers' vigorous and wide-ranging challenges.[11] In his award, dated May 15, 2003, the CAS arbitrator denied all relief to the Shaffers and concluded that CLH had "no responsibility" for any "claimed defects." He recited that he had arrived at these conclusions "[a]fter reviewing such claimed defects and hearing the proofs and arguments of the parties."[12] Although not free from doubt, it appears that relief was denied because the arbitration proceeding had been commenced well after the two-year limitations period established in the Warranty Agreement, for claims such as those asserted by the Shaffers.

The AAA arbitration hearing was held on May 29, 2003, and the AAA arbitrator issued his award of $18,046.51 to the Shaffers on July 23, 2003.[13] It appears that the AAA arbitrator did not view himself limited by the limitations period established in the Warranty Agreement and, instead, applied a longer period prescribed by the applicable statute of limitations.

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[11] The CAS arbitrator sought to have the Shaffers sign a standard form, *see id.* Ex. A-7, that recited that they agreed to be bound by his decision. They struck through that language and merely confirmed that the CAS arbitrator was a neutral party. The Shaffers, probably because they recognized and had been advised by the CAS that their claim was time-barred, "refused to present a case because [they] had not sought arbitration in the CAS forum." *Id.* Ex. A. at ¶ 7.

[12] Pet'r's Application to Vacate Arbitration Award, Ex. D.

[13] Resp'ts' Mot. for Summ J. to Confirm AAA Arbitration Award Ex. C.

The parties have filed cross-motions for summary judgment. In essence, CLH seeks confirmation of the CAS arbitration award and vacation of the AAA arbitration award; the Shaffers seek the opposite.[14] All agree that there are no factual disputes material to the issues which the Court must resolve.[15] Moreover, disputes involving the confirmation of arbitration awards are regularly amenable to disposition by way of summary judgment.[16]

An arbitration award is to be confirmed under 10 *Del. C.* § 5713 unless grounds exist for vacating the award under 10 *Del. C.* § 5714 or modifying the award under 10 *Del. C.* § 5715.[17] Although the dispute here turns, in large part, on which arbitration forum was the proper one, the Court must first determine the scope of the CAS arbitration decision.

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[14] The Shaffers also suggest that it is possible to confirm both of them by treating the CAS arbitration as resolving claims under the Warranty Agreement and the AAA arbitration as resolving claims under the Construction Contract.

[15] Under Court of Chancery Rule 56(h), the net effect of cross-motions for summary judgment where no party has identified a factual issue precluding summary judgment against it is that the Court addresses the case as if on a stipulated factual record. *See, e.g.*, *The Town of South Bethany v. Nagy*, 2006 WL 1451528, at *1 (Del. Ch. May 12, 2006).

[16] *See, e.g.*, *Daisy Constr. Co. v. Mumford & Miller Concrete, Inc.*, 2005 WL 1653943, at *2 (Del. Ch. June 30, 2005).

[17] "In general, this Court refuses to reconsider the decision of an arbitration panel. The strong public policy support for the resolution of disputes through arbitration requires that courts uphold the decisions reached by such panels, unless the party seeking to vacate presents evidence satisfying a few narrow statutory exceptions." *Travelers Ins. Co. v. Nationwide Mut. Ins. Co.*, 886 A.2d 46, 47 (Del. Ch. 2005). "[T]he Court shall vacate an award where . . . (3) [t]he arbitrators exceeded their powers, or so imperfectly executed them that a final and definite award upon the subject matter submitted was not made . . . , [10 *Del. C.* § 5714(a)(3)] or (5) [t]here was no valid arbitration agreement . . ." 10 *Del. C.* § 5714(a)(5). Delaware law, in this regard, is consistent with the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, which governs because the contractual relationship between the Shaffers and CLH involves interstate commerce.

The CAS arbitrator is entitled to the presumption that he acted within the scope of his authority.[18] The Shaffers contested his authority to hear those claims based on the Construction Contract. Although his award references that he considered the "arguments" of the parties, he did not expressly set forth his decision on the Shaffers' challenge to his jurisdiction. Similarly, he did not expressly state whether he (1) considered the Shaffers' substantive claims under the Construction Contract or (2) concluded that the warranties of the Construction Contract had been superseded by the limited warranties of the Warranty Agreement. In the absence of evidence to the contrary, the Court must presume that the CAS arbitrator considered the Shaffers' arguments and rejected them.[19]

Accordingly, the Court presumes: (1) that the CAS arbitrator concluded that he had authority to consider all claims presented by CLH; (2) that he rejected the Shaffers' challenge to his authority and, thereby, resolved the claims which could have been brought under either the Warranty Agreement or the Construction Contract with respect to the specific defects identified by both CLH and the Shaffers; (3) that the warranty provisions of the Construction Contract were

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[18] *See, e.g.*, *Metromedia Energy, Inc. v. Enserch Energy Servs., Inc.*, 409 F.3d 574, 580 (3d Cir. 2005).

[19] "So that when an award is made, . . . [it is to be] presume[d] that the arbitrators . . . considered every matter submitted to them . . . unless it appears on the face of the award itself, or by other evidence, that they left some submitted matter out, and omitted to consider and pass upon that particular subject." *Fooks v. Lawson*, 40 A. 661, 663 (Del. Super. 1893); *see also Simpson v. Simpson*, 232 N.W.2d 132 (Neb. 1975); *Fabio v. Employers' Liability Assurance Corp., Ltd.*, 197 N.E.2d 598, 600-01 (Mass. 1964).

superseded by those of the Warranty Agreement and, therefore, the only surviving warranties were those provided by the Warranty Agreement; and (5) finally, that the Shaffers failed to demonstrate any entitlement to relief, most likely because their claims were time-barred.

As a general matter, questions of substantive arbitrability are for the courts to consider. Contracting parties who are free to choose arbitration as their mechanism for dispute resolution, are also free to specify that questions of arbitrability will be for the arbitrator.[20] The Booklet expressly confers upon the arbitrator (*i.e.*, the CAS arbitrator) the right to decide arbitrability. It provides: "Questions of whether issues are arbitrable shall be determined by the arbitrators."[21]

The Shaffers argue that the Construction Contract and the Warranty Agreement are not inconsistent in their treatment of arbitration because, although dealing with the same general subject matter, each addresses separate issues. Thus, according to the Shaffers, neither arbitrator had exclusive jurisdiction over the dispute. They view the warranty as an additional benefit—one over and above the

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[20] *James & Jackson, LLC v. Willie Gary, LLC*, 906 A.2d 76, 79 (Del. 2006).

[21] *See supra* note 7. Even if the parties do not expressly agree to submit the question of arbitrability to the arbitrator, they will be deemed to have done so "where the arbitration clause generally provides for arbitration of all disputes and also incorporates a set of arbitration rules that empower arbitrators to decide arbitrability." *James & Jackson, LLC*, 906 A.2d at 80. Because the Construction Contact does not incorporate (or even refer to) the AAA rules, it is doubtful that it should be read to assign the function of determining arbitrability to the AAA arbitrator.

rights secured through the Construction Contract. Arbitration under the Construction Contract is said to be available for one set of potential claims; arbitration under the warranty, before a different arbitrator, is available for a different set of claims—those arising exclusively under the warranty. As such, according to the Shaffers, the agreements to arbitrate are not inconsistent because they reflect the parties' agreement that different rights could be vindicated before different tribunals. Because there is no inherent reason why the Shaffers cannot be the beneficiary of two separate and distinct sets of warranties, that a separate warranty with a separate dispute resolution provision was provided does not compel the conclusion that there is such an inconsistency that the new contract must prevail over the old contract. In short, they argue that there is nothing necessarily inconsistent between arbitrating a warranty under the Construction Contract before the AAA and arbitrating a warranty under the Warranty Agreement before the CAS, especially because the scope of the warranties differs substantially.

The question, thus, becomes one of whether all claims relating to the construction of the Shaffers' dwelling were required to be submitted to the CAS arbitrator.[22] A review of the reasoning which could have supported the CAS

[22] For purposes of this question, it makes no difference whether the Construction Contract provides for arbitration (as it does) or allows for litigation as the dispute resolution process.

arbitrator's decision is useful in determining whether there are any grounds for vacating his award. The parties agreed to arbitrate in the CAS forum "[a]ny controversy or claim or complaint arising out of or relating to the workmanship/systems limited warranty coverages provided under the terms of this [Warranty] Agreement."[23] The defects which plague the Shaffers' dwelling all involved either "workmanship" or "systems" (or both) as provided by CLH. Thus, the Shaffers' complaints are based on the work of CLH that was subject to the limited warranties provided by the Warranty Agreement. Their claims (or, more specifically, the claims which they sought to assert before the AAA) did not "arise out of" the limited warranty coverages. They were not seeking to obtain any benefit under the limited warranty. CLH argues, however, that the clause "relating to" the "workmanship/systems limited warranty coverages" encompasses the Shaffers' claims. The phrase "relating to" is a broadly encompassing term; it has been called the "paradigm of a broad clause,"[24] and has generally been accepted as evidencing the parties' agreement to include even "collateral disputes that relate to the agreement containing the clause."[25] The Shaffers' complaints addressed the workmanship provided by CLH and the systems installed by CLH and fairly fall within the scope of "relating to" the limited warranties provided for these items.

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[23] *See supra* note 7.
[24] *Collins & Aikman Prods. Co. v. Bldg. Sys., Inc.*, 58 F.3d 16, 20 (2d Cir. 1995).
[25] *Wise v. Tidal Constr. Co., Inc.*, 583 S.E. 2d 466, 468 (Ga. App. 2003).

The alleged defects necessarily "relate to" any of the warranties provided under the Warranty Agreement. In short, by the terms of the Warranty Agreement, the Shaffers agreed to arbitrate any dispute regarding CLH's defective workmanship/systems before the CAS.

In addition, as noted, both the Construction Contract and the Warranty Agreement provide for arbitration. To the extent that the Warranty Agreement and the Construction Contract may conflict in their prescriptions of the appropriate dispute resolution mechanism, the earlier Construction Contract must give way to the Warranty Agreement. When a later-in-time contract addresses the same issues (here, the means of dispute resolution and the rights to be asserted), it will prevail in the absence of evidence to the contrary.

> When two parties make a new contract that is inconsistent with the terms of a previous one dealing with the same subject matter, it may be described as both a rescission and a discharge by substitution. If the new contract contains no statement as to the intended effect upon the old contract, again, the court must confront what may be a difficult problem of interpretation. At times it may be reasonable to hold that the rescission and the substitution are only partial, part of the old contract remaining enforceable.[26]

The new contract, as a general matter, will control over the old contract with respect to the same subject matter to the extent that the new contract is inconsistent

[26] CORBIN ON CONTRACTS § 67.8[6], at 13-67 (footnotes omitted).

with the old contract or if the parties expressly agreed that the new contract would supersede the old one.[27]

Thus, the CAS arbitrator, in concluding that his forum was the proper and exclusive forum for the Shaffers' claims against CLH, acted both within his authority and in a reasonable manner that precludes judicial interference.

The Shaffers also challenge the validity of the arbitration process before the CAS by arguing that only they (and not CLH) could initiate arbitration proceedings in that forum. In essence, they contend that CLH had no standing to seek arbitration. They point out: (1) only the homeowner can recover under the warranty (*i.e.*, the builder, almost by definition, can have no claim under the warranty); (2) the Booklet's instructions on how to commence arbitration refer exclusively to "you," which, for purposes of the Booklet, means the homeowner; and (3) the Booklet recites that the arbitration process is "limited to a two-party arbitration between you, the individual homeowner as one party, and NHIC (or HBW) the second party," thus, suggesting that CLH may not be a party to the proceeding and, if not a party to the proceeding, should not have the ability to initiate the proceeding.

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[27] *Lee Builders, Inc. v. Wells*, 92 A.2d 710, 715 (Del. Ch. 1952), *reh'g denied*, 95 A.2d 692 (Del. Ch. 1953), *rev'd on other grounds*, 99 A.2d 620 (Del. 1953); *see also Moore v. Carrollton Enters. Ltd. P'ship*, 1995 WL 108706, at *3 (Del. Super. Feb. 7, 1995). The interpretation of a contract is, of course, an effort to ascertain the parties' shared intent. *See, e.g.*, *Comrie v. Enterasys Networks, Inc.*, 837 A.2d 1, 13 (Del. Ch. 2003). Even the notion that the new contract prevails to the extent that it is inconsistent with the old contract reflects the understanding that the reasonable third-party observer would draw from reading the two documents.

On the other hand, the form for submitting disputes to the CAS arbitration process has a line for signature on behalf of the contractor. That strongly suggests that the contractor has the authority to initiate the arbitration process.[28] More importantly, CCH provided the Shaffers with a warranty agreement that established arbitration as the appropriate dispute resolution mechanism. CCH thus has the right to insist that any disputes arising with respect to its work relating to the Warranty Agreement be resolved through the agreed-upon arbitration process. Moreover, if the parties agreed that questions of arbitrability are to be resolved by the CAS arbitrator, then the CLH could reasonably be expected to assert and protect those rights in that forum. Because both CLH and the Shaffers agreed to arbitrate in the CAS forum, it follows that both should be able to access that process.

With confirmation of the authority of the CAS arbitrator to resolve the full range of issues presented by CLH's arbitration demand, which included all of the claims presented by the Shaffers, the CAS arbitration award, as a matter of resolution of the substantive dispute between the parties, must also be confirmed. Although one could construe the Warranty Agreement and the Construction Contract to allow the two sets of warranties to coexist, it was neither irrational nor unreasonable for the CAS arbitrator to have concluded—however implicitly—that

[28] The form apparently was not supplied initially with the Warranty Agreement.

the Warranty Agreement alone determines the scope of the warranty protection available to the Shaffers.[29] For example, the Warranty Agreement provided: "[The Warranty Agreement] is your builder's limited warranty to you . . . to the extent possible under the laws of [Delaware], all other warranties, express or implied, . . . are hereby disclaimed." Especially in light of the deference given to arbitrator's substantive decisions, this excerpt of the Warranty Agreement amply supports the conclusion that the Warranty Agreement superseded the Construction Contract with respect to warranty coverage. Because of the short limitations period under the Warranty Agreement, the CAS arbitrator reasonably concluded that the Shaffers' claims were not submitted on a timely basis and therefore are time barred. Indeed, the Shaffers acknowledge that any claims arising exclusively

[29] As the Shaffers correctly point out, the Warranty Agreement does not expressly terminate their rights under the Construction Contract. The Warranty Agreement's "Express Limited Warranty" affords protection of a much narrower scope than did the warranty of good quality and workmanship that would readily have been implied under the Construction Contract. *See, e.g.*, *Council of Unit Owners of Breakwater House Condo. v. Simpler*, 603 A.2d 792 (Del. 1992). Whether the Warranty Agreement (which was anticipated by the Construction Contract) is a "good" or "bad" deal for the homeowner is not before the Court. In *Burch v. Second Judicial District*, 49 P.3d 647 (Nev. 2002), the Nevada Supreme Court concluded that a similar homeowner's warranty agreement was an unconscionable contract of adhesion. In substance, in comparison to the Construction Contract with CLH, the Shaffers traded broad implied rights for a very limited warranty of short duration. The principal benefit, for the Shaffers, of such an agreement was that CLH's obligations were, in essence, guaranteed by a third party insurer. Thus, the Shaffers, post-closing, were not exposed to the same degree of credit risk that might have confronted them in the absence of the Warranty Agreement. Presumably—and any economic analysis of the relationship is beyond the scope of the Court's responsibility in this matter—CLH would argue that the certainty provided by the Warranty Agreement (or the certainty that it hoped that the Warranty Agreement would provide) post-closing reduced its risks and therefore allowed it to charge a lower price for its efforts.

under the Warranty Agreement were not filed within the Warranty Agreement's very short limitations period.

Thus, the Court may not set aside the results of the CAS arbitration based on anything raised by the Shaffers regarding that process. That conclusion, however, leaves the question of what happens to the award issued by the AAA arbitrator who also purportedly had broad powers conferred by the Construction Contract.

The Warranty Agreement provides that the decision of the CAS arbitrator is "final and binding." If the AAA arbitrator may later issue an inconsistent award, the contractually agreed upon "finality" would be lost. Thus, arbitration awards may be given *res judicata* effect if the second-in-time arbitrator attempts to resolve the same issues that have already been resolved by the first-in-time arbitrator.[30] Once the claims have been finally decided by an arbitrator with authority (and that award has not been vacated),[31] there is nothing for the second arbitrator to decide and, thus, any decision by the second arbitrator would be beyond his powers.[32] The AAA arbitrator, by deciding those claims previously resolved—albeit by

[30] *See W.B. Venables & Sons, Inc. v. Bd. of Educ.*, 1981 WL 88263, at *8 (Del. Ch. June 15, 1981); *Pinnacle Env't Sys., Inc. v. Cannon Bldg. of Troy Assocs.*, 760 N.Y.S.2d 253, 254 (App. Div. 2003) ("[T]he second arbitrator exceeded her power by conducting a hearing and making an award on the same claim as the first arbitrator's award, which was binding.").

[31] It is not necessary that the award be confirmed judicially before it is entitled to *res judicata* treatment.

[32] *See* 10 *Del. C.* § 5714(a)(3) ("[T]he Court shall vacate an award where . . . [t]he arbitrators exceeded their powers . . .").

implication—by the CAS arbitrator, exceeded his authority and his award, therefore, must be vacated.[33]

Accordingly, because there are no material facts in dispute and CCH is entitled to judgment as a matter of law, the Shaffer's motion for summary judgment is denied and the CLH's motion for summary judgment is granted. Therefore, the AAA arbitration award must be vacated and the CAS arbitration award confirmed.[34]

An implementing order will be entered.

[33] Although the statutory grounds for vacating an arbitration award are very narrow, one of those grounds is that the arbitrator exceeded his powers. With the prior arbitrator's "final" resolution of the dispute, the arbitrator who later purports to resolve the issues necessarily falls within the statutory criteria for vacating the award.

[34] The result here may be somewhat unsettling because the outcome ultimately may be viewed as dependent upon which arbitration forum was the more responsive in scheduling an arbitration hearing and issuing an award. Without going into detail, it is a fair inference that the AAA arbitration award—if not precluded by the CAS award—could have been confirmed. In short, given the deference accorded to arbitrators, and when considered without regard to the CAS award, there would seem to be little reason on the merits to overturn the AAA award. It is, however, inconsistent with the CAS award and, with the presumption that, in the absence of contravening evidence (of which there is none), the CAS arbitrator resolved all issues submitted to him, the CAS award must be given priority.